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Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

JOSEPH SACHS,

Petitioner,

versus

THE GOVERNMENT OF THE CANAL ZONE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Joseph Sachs, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered July 19, 1949, affirming a judgment of the United States District Court for the District of the Canal Zone convicting him of criminal libel under Sections 351 and 352, Title V, of the Canal Zone Code (herein called the Code).

The Opinion Below

The opinion below, written by Judge Hutcheson, has not yet been officially reported and appears in the record at 301-316.

Summary Statement of Matter Involved

This appeal presents not only fundamental questions of whether petitioner was accorded due process of law but also challenges the fairness and disinterestedness of the administration of federal criminal justice by the District Attorney of the Canal Zone in a matter in which he had substantial personal interest.

Petitioner is an international representative of United Public Workers (CIO), assigned to the Canal Zone to service its Local 713, a labor organization of native Panamanian, West Indian and Negro workers there employed by the United States. These workers are commonly known, and are referred to throughout the record, as "silver" workers, in contrast to the Americans employed in the Zone, who are known as "gold" employees.

Petitioner was convicted on an information charging criminal libel of Daniel E. McGrath, the District Attorney of the Zone (R. 1-3). Mr. McGrath, in addition to filing his information in his capacity of District Attorney to redress a criminal libel of himself, also commenced civil suits against petitioner, the international union and the local union seeking $75,000 in damages, evidence of which the trial court excluded (R. 48).

After filing the information, the District Attorney on several occasions, in preparation for the trial, issued subpoenas to "silver" employees of the union. One of them, Lucille Harewood, was called at the trial by the Government over petitioner's objection (R. 89-95). There was no basis in law for the issuance of these subpoenas. A short time previously the District Attorney had publicly announced, in connection with another prosecution, in which he was not the complainant, that he had no power to issue such subpoenas [Deft's avowals 2 and 3 (R. 270-1)]. The District Attorney caused them to be served by the United States Marshal, returnable before him in his office, ex parte, without leave of Court or notice to petitioner. One of the

subpoenas was returnable forthwith on fifteen minutes' notice (R. 82). Miss Harewood was interrogated at length and later a stenographer was called in (R. 84) to make a transcript for the sole use of the District Attorney and which the prosecutor introduced at the trial [R. 92, Govt's Ex. H (R. 241-9)] (R. 84-5). She was not advised of her rights or of the invalidity of the subpoenas (R. 13). On the first occasion he demanded that she procure for him a sample of the union's typing (R. 12) and when she did not do so he subpoenaed her again in the same manner to demand an explanation (R. 12, 87).

There can be no doubt that his misuse of the subpoenas was wrong and knowingly so (see Code, Chap. 17, Secs. 651-5, and Art. 3, Chap. 17).

Petitioner moved before trial to suppress the evidence obtained by these subpoenas (R. 8-14). The District Attorney made no return to the motion and did not assert any right to do what he had done. He claimed merely that petitioner had no status to complain. The motion was denied (R. 15-16) and thereafter the District Attorney did the same thing again on the very morning of the trial (R. 88-9).

A rule of the District Court in effect before the decision of *Ballard* v. *United States,* 329 U. S. 187, and unchanged since, excluded women from jury service. Before trial petitioner's challenge to this exclusion (R. 14-15) was overruled (R. 16) and women were excluded from the panel. This ruling was affirmed by the Court of Appeals apparently on the ground that a male defendant may not except to the exclusion of females (R. 307).

Petitioner demurred to the information (R. 6-8) on the ground of vagueness and insufficiency, but this was also overruled (R. 16-18) and, in a move without precedent in the Zone, petitioner's bail thereupon increased three days before trial (R. 16, 250).

Issue was then joined on a plea of not guilty (R. 16). Petitioner contended that the statutes under which he was charged deal only with "publication",—not "circulation",—and that publication had occurred within the Republic of

Panama and not within the jurisdiction of the court or within the meaning of the Code (footnote R. 305).

The trial court ruled that if it were to hold that publication "*in Panama* * * * within a stone's throw of the Canal Zone" were insufficient to constitute the offense of libel within the Zone "we would be adopting a mere technical subterfuge" (R. 123). It held also that "publication" included "circulation" (R. 137). The court announced at the outset (R. 41) and emphasized throughout the trial and in its charge (R. 42, 112, 143, 144, 145, 146, 147, 148, 149) that "we are going to try this case entirely on the truth or untruth of those charges contained in the libel" (R. 41), although petitioner had not pleaded truth and justification. When, however, petitioner attempted to meet the issues as thus framed by the court, it excluded all his proofs to establish justification and substantial truth [R. 40, 41, 53-4, 66, 73, 112, 98, Deft's avowals 2 (270), 3 (R. 271-3), 5 (R. 275)]. The Court of Appeals sustained these exclusions because it held that the proffers were not "at all relevant" under his plea and as not addressed to the charges made against the District Attorney (R. 310).

The Court of Appeals ignored the conduct of the prosecutor in connection with the sentence as well as other points which are discussed below.

At the trial the court excluded evidence to prove the following:

On the afternoon of February 3, 1948, the press in Panama City,* under eight-column front page headlines featured an expose of the United Public Workers as a "gigantic swindle of the 'silver' workers" and charged that named officers, including petitioner, had devised the union as a scheme to mulct and exploit the silver workers for personal gain. It referred to petitioner and the other offi-

* Whenever used herein Panama City means a place solely within the Republic of Panama and outside of the territory or jurisdiction of the Canal Zone. The Zone means a place within the jurisdiction of the United States. Panama City abuts the Zone on the Pacific side of the isthmus.

cials as "embezzlers", "this modern gang of buccaneers" and as "all involved in a gigantic swindle", among other like characterizations [Deft's No. 4 (R. 278)]. The article was based upon a letter written by one Edward Cheresh, petitioner's predecessor as international representative, which was reproduced in full in photostatic form.

Petitioner engaged time from radio station HOG, located in Panama City, for the evening of February 4th, to answer Cheresh and the press (R. 104, 106, 125).

The Government's evidence established that on the morning of February 4th petitioner prepared his reply to Cheresh and left it with Miss Harewood, the union's stenographer, for preparation as a newspaper release to follow his broadcast (R. 77). At about 9.30 A. M. he was approached by Mrs. McIlhenny, a newspaper reporter, for comment on the Cheresh charges but he told her to wait until his broadcast (R. 61, 104). He then left for the other side of the isthmus and returned to Panama City some time after 6 o'clock for his broadcast (R. 91-2).

The Government's undisputed testimony established that, as prepared, the speech and the newspaper release were addressed solely to the Cheresh charges and did not make the slightest reference to the District Attorney or to the matter upon which this prosecution is based, nor is there any suggestion in the record that petitioner was or ever had been engaged in any controversy with the District Attorney whatever (R. 73-4, 78-9).

The court excludes evidence [Deft's No. 4 (R. 274), R. 39-41] that upon his arrival in Panama City in the evening of February 4th petitioner saw new headlines featured in that afternoon's press as follows:

"CHERESH CHARGES SUBSTANTIATED BY DISTRICT ATTORNEY'S EVIDENCE"

The court excluded evidence to show that the newspaper stories repeated the essence of the charges con-

tained in Cheresh's letter and quoted the District Attorney as saying in part:

> "The (Cheresh) letter coincides with evidence in our possession."
>
> "Hard-working, conscientious 'silver' men and women were taken advantage of, he stated."

The District Attorney said also that "some of the individuals mentioned in the Cheresh letter" had brought "considerable pressure" to bear on the union's accountants not to make an "honest examination" of its books.

The court excluded evidence to show that upon arriving at the radio station petitioner composed two paragraphs which he inserted toward the end of his previously prepared reply to Cheresh (R. 60, 73, 79). Except for these paragraphs the speech [Govt's Exs. B and C (R. 26-38)] was addressed solely to the Cheresh charges and to the conduct of the local press which had featured them.

The two paragraphs thus added at the radio station in Panama City were addressed to the District Attorney's conduct in making his accusation to the press. In the first paragraph petitioner challenged the District Attorney to "either put up or shut up! I publicly dare you to arrest me if you have any evidence." The prosecution does not rest upon this paragraph.

The second paragraph forms the basis of the information and was as follows:

> "If I were the District Attorney, I would be just a little more concerned with my own neck before I took a swipe at somebody else's. For your information our attorneys in Washington are already looking into the scandalous handling of the Nolan case. We have also received reliable information that an important affidavit figuring in the case was obtained by your office through trickery and duress. It has been reported that an attempt was made to bribe the defendant with a suspended sentence if he would enter a guilty plea and promise not to take civil action against

you. So I say once again you had better give a few more thoughts to your own precarious position before getting into more hot water."

The Nolan case referred to a former official of Local 713 who in November, 1947, had been charged with forgery of a union check (R. 266) and was then awaiting trial and was subsequently convicted (R. 190). The trial court, although emphasizing that truth was the issue, refused to permit petitioner to discuss the Nolan case, yet allowed the Government to do so [R. 41, 96-8, Deft's avowals 2 (R. 270), 3 (R. 271-3), 5 (R. 275)].

The District Attorney did not accept petitioner's challenge to institute proceedings charging embezzling, swindling, and the like, and has not done so notwithstanding his announcement to the press that he had evidence substantiating such charges. Instead he filed the instant information and started his civil suits.

The undisputed evidence showed that petitioner made his broadcast at the radio station in Panama City, reading it in the presence of the radio announcer, Dwight A. McKabney (R. 126), and proceeded to his home for dinner. At about 9 P. M. that evening McKabney called at petitioner's home in Panama City, telling him that he was "on the spot" because the Panama laws required that the station keep on file a copy of the speech and he had neglected to obtain it (R. 126-7). Petitioner thereupon, at his home in Panama City, gave McKabney his only copy of the speech, requesting that it be returned (R. 126-27). McKabney returned to the radio station where he made five copies of the speech, retaining one for the files but delivering the others to the press in Panama City (R. 110, 114-16, 128-9).

The undisputed evidence is that none of these events occurred within the jurisdiction of the court or anywhere in the Zone.

On the following day, reports of the speech, including the reference to the District Attorney, appeared in the Panama City press, which is circulated in the Zone (R. 64, 66, 68).

The Government's testimony, over objection and claim of surprise and variance (R. 57-8, 69), showed also that on the following day, February 5th, at his office in the Zone, petitioner caused the excerpts which he had added at the radio station to be typewritten by his clerical assistants and translated into Spanish. There was, however, a dispute among the Government witnesses as to whether he delivered a copy to a reporter on that occasion. Mrs. Undine Reid, a former employee, testified he did so (R. 57-8). Miss Harewood said that he did not, and the reporter, who testified by deposition, stated that at the time involved she was at the District Attorney's office and did not testify that she was at petitioner's office (R. 63, 68-70, 91-2, 104, 110, 116-8).

In connection with the sentence, the Government served a notice that it would offer oral and documentary evidence with reference to circumstances in aggravation of the punishment (R. 28). Petitioner's objections to this procedure (R. 35) were overruled (R. 36) and the Government subpoenaed four "silver" workers who were examined concerning their activities in support of petitioner's defense and one Max Brodsky. The prosecutor's violent and inflammatory examination of Brodsky and his summation on sentence are not susceptible of simple condensation and are discussed below.

The court sentenced petitioner to nine months in the penitentionary at hard labor, this being the first known penitentiary sentence imposed in a criminal libel case in the Zone.

Nine days after the Court of Appeals' affirmance and before the expiration of the twenty-one days allowed by its rules for the mandate to issue, the District Judge, on the eve of his departure for the United States, on ex parte motion of the District Attorney, revoked petitioner's bail and caused his arrest at his usual place of business in the Zone without notice or the customary previous request that he surrender. Bail pending this petition was granted by Judge Hutcheson the following day.

Statutes Involved

The pertinent provisions of the Code are set out in the appendix to this petition.

Questions Presented

The underlying question is whether the District Attorney's trusteeship of "the awful instrument of the criminal law" (*McNabb* v. *United States*, 318 U. S. at 343) has been used by him in this case with decency and fairness or whether it has been abused by him to crush an opponent in a controversy improperly and unprofessionally begun by the District Attorney, and availed of by him to gain personal advantage in a way offensive to those traditions and "notions of good policy" (*Fay* v. *New York*, 332 U. S. 261 at 287) which this court has mandated for federal justice. Subsidiary to this are the following:

The misconduct of the prosecutor:

1. (a) Should the motion to suppress evidence obtained by the District Attorney by color of law through the issuance of invalid subpoenas in this proceeding have been granted?

(b) Was the prosecutor's conduct in connection with the sentence proper?

The exclusion of women from the jury:

2. Was the conceded systematic exclusion of women from the petit panel authorized, and, if not, did petitioner have the right to challenge such exclusion?

The denial of due process:

3. Was petitioner deprived of due process of law

(a) By the inclusion in the information of a charge and by proof at the trial of circulation of a libel under a statute proscribing only publication;

(b) By proof of publication and circulation by others when charged under Section 352 (publication by himself) but not under Section 357 (publication by others of a libel authored by him)?

(c) By the allowance, under a one count information charging a publication by petitioner in writing, in English, in the Zone, on or about February 4th, of proof of a radio broadcast in Panama City, the reception of the broadcast in the Zone, the delivery of copies to newspapers in Panama City, the circulation of the newspapers in the Zone, the translation of the speech into Spanish by petitioner's employees, the delivery of a copy to a reporter, and similar other "publications";

(d) By the trial court's refusal to charge that the jury had to find a publication in the Zone before it could convict (R. 23-6) and its emphasis as the sole issues, throughout the trial (R. 41, 66, 112) and in its charge [Instructions 1, 5, 6, 8, 9, 11 (R. 140, 143-4, 146-9)] of what the Court of Appeals called the irrelevant issues of truth and justification;

(e) By the trial court's refusal on the issue of malice, to allow proof that petitioner spoke in the heat of reply to an immediately prior attack by the District Attorney (R. 39-41).

Jurisdiction

The judgment of the Court of Appeals was entered July 19, 1949 (R. 317). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254.

Reasons for Granting the Writ and Supporting Argument

There are two reasons for granting the writ:

(1) The Court of Appeals so far overlooked or sanctioned a departure by the lower Court from the standards of fairness and disinterestness to be observed in federal criminal proceedings as to call for an exercise of this Court's power of supervision, and

(2) The Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

Preliminary

Petitioner prays review of the manner of his prosecution, not of the fact that he was prosecuted. Yet it must be pointed out that the fact, as well as the manner, of his prosecution tests the equality of American justice in the Zone, first as between officials and citizens and, second, as between "gold" workers and "silver" workers, represented by petitioner.

The record, and the broadcast speech for which petitioner was convicted, make clear that the controversy between the District Attorney and petitioner was initiated by the District Attorney's statement to the press on February 4th, that he had "evidence to substantiate" the serious Cheresh charges that petitioner was a "swindler" and "embezzler" living off the backs of the "silver" workers at the very time that their union was under serious press attack. If the District Attorney had such evidence his sworn duty was and is to prosecute. There was and has been no such prosecution. It was grossly improper to air these charge in the press. Canon 20, *Canons of Professional Ethics*. The effect of such a statement to the press from the highest law enforcement official in the Zone is incalculably more devastating than the matter upon which petitioner was convicted.

Petitioner argued to the Court of Appeals "that the District Attorney is, of course, entitled to the protection of the libel laws, both civil and criminal. By the same token, he is subject to them even as the appellant who is entitled to the same protection of his reputation as is the District Attorney."

The Court of Appeals, characterizing this suggestion as angry, venomous and self-righteous, stated that if the District Attorney violated the libel laws "he ought to be prosecuted for it" (R. 314).

The fact is that he has not been and, because of his preferred position and control of the prosecution machinery, he will not be prosecuted. We suggest therefore that the administration of justice is placed under a serious cloud if only the victim of the aggression and not the instigator is prosecuted and especially where, as here, the aggressor is also the prosecutor.

A) The Illegally Obtained Evidence

The Government did not claim and the Court of Appeals did not find that the subpoenas issued by the District Attorney before the trial were lawful. The Court said that "assuming, without deciding, that the District Attorney's action was an invasion of rights of Miss Harewood which she could have claimed, it was not, it could not have been an invasion of defendant's rights" (R. 306-7).

Petitioner urges that in so holding the Court of Appeals overlooked the essential identity between petitioner and Miss Harewood arising from her relationship as his typist and that the decision therefore appears contra to *Silverthorne Lumber Corp.* v. *United States,* 251 U. S. 385, where illegal subpoenaes were issued, not to the defendants, but to a corporation and the employees of the corporation of which they were officers. The Court, held, in an opinion by Mr. Justice Holmes, that the motion to suppress should have been granted and that the knowledge gained thereby not used.

But even if the Fourth Amendment should be considered inapplicable for the reason advanced by the Court of Appeals, petitioner believes that the motion to suppress should nevertheless have been granted in this case because of the gravity of the District Attorney's abuse of process stemming from (1) his personal interest in the matter as complainant in the criminal proceeding and as plaintiff in companion civil suits; (2) his knowledge of the wrongfulness of his action disclosed by his previous public announcement that he had no authority to issue such subpoenas; (3) the use of the subpoenas to develop matters affecting the liability of the unions, relevant to his civil case and of highly doubtful relevance to the criminal proceeding (R. 242, 247-8); (4) his apparent reliance upon the fact that only the rights of colored persons were involved [Govt's Ex. K (R. 249)] * and (5) his repetition of the abuse after it had been called to his attention by the motion to the court.

Petitioner urges that these actions raise grave questions not only under the minimal standards of the Fourth

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* The following excerpt (supplied by the court reporter but not printed in the record) from the minutes of the argument on the motion to suppress partially reflects the prosecutor's conduct on racial and religious issues:

> "(Mr. de Wolfe argued to the Court in the course of which he said:)
>
> "'Glasser, the case was of a young Jewish assistant District Attorney out in Chicago. He was alleged to have taken some money along with other district attorneys. There was no motion to suppress, as I recall it, in that case.'
>
> "(Mr. de Wolfe continued his argument to the Court.)
>
> "(Mr. Cammer argued to the Court in the course of which he said:)
>
> "'Now, your Honor, during the course of the argument this morning, Mr. de Wolfe made reference several times to the fact that this girl is a colored girl, and in describing the facts in the Glasser case, your Honor, he said "a Jewish District Attorney" was convicted of taking bribes.
>
> "'I read the Glasser case. I do not see that there is anything in that case that tells Mr. de Wolfe that the defendant was Jewish, and if he were, what relevance would that have to anything before this Court?'"

Amendment but also with respect to those notions of good policy and those higher standards of disinterested fairness and decency which this court has commanded to be observed in the administration of federal criminal justice. *McNabb* v. *United States,* 318 U. S. 322; *Wolf* v. *Colorado,* ___ U. S. ___, June 27, 1949, Nos. 17-18, 17 U. S. Law Week 4638. See also *Fay* v. *New York,* 332 U. S. 261 at 284, et seq.

B) The Exclusion of Women

The Court of Appeals dismissed as "especially without substance" petitioner's contention that he was denied due process by the conceded systematic exclusion of women from the panel of petit veniremen. [The right to due process is provided by the Code (Title I, Sec. 1.) Since, however, the Sixth Amendment is not applicable in the Zone (*Balzac* v. *Puerto Rico,* 258 U. S. 298) there are no grand juries and prosecutions are founded on informations by the District Attorney and not upon indictments.]

The decision apparently accepts the District Attorney's contention that a male defendant may not challenge a panel on this ground and that there is no constitutional requirement that women be eligible for service.

Petitioner contends that the Court of Appeals thus misconceived the basis of the holdings of this Court respecting the necessity, albeit not constitutional, based upon "the American tradition" that a jury trial "fairly contemplates an impartial jury drawn from a cross section of the community." *Ballard* v. *United States,* 329 U. S. 187, at 192-3, citing *Thiel* v. *Southern Pacific Railway,* 328 U. S. 217. The holding is therefore in flat disregard of the *Ballard* decision, supra, and *Zap* v. *United States,* 330 U. S. 800 (reversing 151 Fed. (2d) 100, and granting, on the authority of the *Ballard* case, a second petition for rehearing and sustaining a challenge of a male defendant because of exclusion of women from the grand jury panel and directing dismissal of the indictment. In the *Ballard* case one of the defendants, Donald Ballard, was a male).

The only statutory requirements for eligibility for jury service in the Zone are citizenship and residence. Title VII, Section 34 of the Code provides:

> "Selection, summoning and serving of jurors.- The district judge shall provide for the selection, summoning and serving of jurors from among the citizens of the United States subject to jury duty to serve the division of the district in which such jurors reside. Any citizen of the United States who is employed in the Panama Canal or the Panama Railroad Company within the Canal Zone or who resides in a residence owned by the Panama Canal or Panama Railroad Company in territory contiguous to the Canal Zone shall for the purpose of this section be deemed to reside in the division nearest his place of residence."

Sex is not a statutory criteria of qualification. Nevertheless the rule of the District Court, unchanged since the *Ballard* decision (Part V, Section 1, Rules of the District Court) prescribing "male sex" as a condition for qualification, was applied in this case notwithstanding the challenge. (Cf. *Thiel* v. *Southern Pacific Railway,* 328 U. S. 217, at 223: "Nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for the practice.")

The authorities cited by the Court of Appeals to sustain the overruling of the challenge are based (1) on cases originating in state courts (*Fay* v. *New York,* 332 U. S. 261; *Gibson* v. *Mississippi,* 162 U. S. 565; *Commonwealth* v. *Weloski,* 177 N. E. 656) and therefore in disregard of the careful distinction between this court's power of supervision over state and federal juries noted by Mr. Justice Jackson in *Fay* v. *New York,* 332 U. S. at 284, et seq., cf. *Moore* v. *New York,* 333 U. S. 565; (2) a case where the exclusion of women had express statutory sanction (*I.L.W.U.* v. *Ackerman,* 85 Fed. Supp. 65, applying the Hawaiian Organic Act, 45 U. S. C. A. 635, " * * * no person who is not a male citizen of the United States * * * shall be a qualified juror or grand juror in the Territory of Hawaii." The Canal Zone Code contains no such provision) and (3) *Johnson* v. *Langford,* 167 Fed. (2d) 738 (C. C.

A. 5th), a case where the challenge was not timely, as here, but was made for the first time after conviction and sentence but wherein the decision rested upon the ground that a male could not complain of the exclusion of women, and which is thus contra to the decision of this Court in *Zap* v. *United States*, supra.

Although this Court has held that it is unnecessary to show prejudice by the exclusion (*Glasser* v. *United States*, 315 U. S. 60), the exclusion was particularly prejudicial in the present case.

Petitioner, although white, is the representative of the "silver" workers' union, whose members are non-white. The approximately 17,000 "silver" workers in the Zone are an integral and substantial part of the community. By reason of their non-citizenship they are disqualified from jury service.

As is evident from the record, this case is charged with over and undertones of controversy growing from the exercise by the "silver" workers of their right to unionize, extending even to and between the District Attorney and the Executive Secretary of the Zone [Deft's avowals 3 (R. 271-2) and 5 (R. 275)].

The "gold" workers, numbering about 5,000, are not neutral in the controversy. They belong to a rival A. F. L. union and because of their supervisory functions the United Public Workers is required from time to time to file grievances against them.

As a result of the historic discrimination against "silver" workers in the Zone with respect to segregation, wages, housing, privileges, and the like there is a prevalent feeling among the "gold" workers that their preferred positions are threatened by the demands advanced by the CIO in behalf of the "silver" workers.

Under these circumstances the possibility of a fair trial for a CIO organizer before the "gold" employees who compose the juries in the Zone, is indeed remote. But even this possibility is destroyed by systematic exclusion from jury service of women who, as housewives, would perhaps be not so directly involved.

It is, however, unnecessary to allege or show prejudice from the exclusion. It is enough to show the exclusion (*Thiel* v. *Southern Pacific Railway*, 328 U. S. 217). Such exclusion is conceded. It was without statutory authority and contrary to the provisions of the congressional enactment that citizens are eligible for service and in disregard of the clear rulings of this Court on the subject. The panel was therefore improperly constituted and the timely challenge made to it should have been sustained.

C) The Denial of Due Process

The failure of the courts below to distinguish between "publication" and "circulation" under the statute, resulted in petitioner's conviction (1) on charges of "circulation" which do not constitute a crime, on (2) charges of "publications" of which he was not accused; on (3) the basis of testimony which was inadmissible under the narrow charge of which he was accused and (4) in disregard of the critical issue of publication presented by his plea and on the basis of issues of truth and justification which were emphasized by the trial court as the only issue and as to which he was not permitted to make proof (see *Cole* v. *Arkansas*, 333 U. S. 196).

The provisions of the Code deal only with publication. Section 352 refers to one who "publishes" a libel; Section 356 deals with liability of an editor for "publication"; Section 357 deals with liability of the author of a libel published by another and Section 358 refers to the privileges of "publication" of a true report of public proceedings. "Circulation" is never used in the statute and is not within its ambit.

Section 355, defining "publication", provides that "publication" occurs at the time and place that the libel is first exposed or exhibited to another: A libel is "published" if the "accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself."

Distribution thereafter is "circulation"—not "publication". The two are different. *U. S.* v. *Press Publishing Co.*, 219 U. S. 1; *U. S.* v. *Smith*, 173 Fed. 227; *U. S.* v. *Dana*, 68 Fed. 886; *Gregoire* v. *G. P. Putnam's Sons*, 298 N. Y. 119, and cases cited infra.

The Court of Appeals disregarded the fact that this prosecution does not arise under the common law, but under a statute. Its holding that "it is hornbook law that *at common law* a criminal prosecution for libel might be instituted in any jurisdiction where the libelous article was published or circulated" (R. 308) confuses what Congress did with what Congress might have done.

Congress could undoubtedly forbid the circulation as well as publication, of a libel in the jurisdiction. The issue is whether it did so under a statute which proscribed only publication.

Until this decision, it was settled that under a *statute* proscribing "publication", proof of "circulation" within the jurisdiction of a libel "published" outside of the jurisdiction did not establish the offense. *U. S.* v. *Press Publishing Co.*, 219 U. S. 1; *State* v. *Moore*, 140 La. 281; 72 So. 965; *State* v. *Briwa*, 198 La. 970; 5 So. (2) 304; *U. S.* v. *Smith*, 173 Fed. 227; *U. S.* v. *Dana*, 68 Fed. 886.

In the *Press Publishing* case defendant was indicted in the Southern District of New York on two counts under the Assimilative Crimes Act (18 U. S. C., Section 468, 54 Stat. 234) on a charge that it had "published" a criminal libel of the President of the United States and the Secretary of War in the federal post office in New York and on the federal reservation at West Point.

The applicable statute, like the instant one, forbade "publication" but did not refer to "circulation". The proof established that defendants had mailed the offending copies of the New York World to subscribers in West Point from the post office in New York and that the paper had been distributed at West Point as a result. This court unanimously affirmed the dismissal of the indictment on the ground that the proof did not establish "publica-

tion" in either the New York post office or the reservation at West Point within the meaning of the statute "since the primary publication had occurred wholly in New York". To the same effect are *U. S.* v. *Smith*, 173 Fed. 227. (Defendants, newspaper publishers in Indianapolis, had mailed 50 copies to subscribers in the District of Columbia and were there indicted for "publishing" a libel. An application to remove the defendants to the district for trial was denied on the ground that there was no "publication" in Washington but only "circulation" (at p. 232).) See also *U. S.* v. *Dana*, 68 Fed. 886.

The foregoing constitute the only federal holdings on the construction applicable to a criminal libel statute proscribing only "publication". The decision sought to be reviewed is the first which disregards it.

The decision sought to be reviewed is also contrary to the otherwise present unanimity among state and federal authorities around the "one publication" doctrine, i.e., that publication of a defamatory statement in an issue of a book, newspaper or magazine, no matter how widely circulated, constitutes but one publication and that, only at the time and at the place of the original "primary" publication and that the continued dissemination of copies of the original is not a new and different "publication". *Gregoire* v. *G. P. Putnam's Sons*, 298 N. Y. 119 (1948); *Wolfson* v. *Syracuse Newspapers*, 254 App. Div. 211, aff'd 279 N. Y. 716; *Hartman* v. *Time, Inc.*, 60 N. Y. Supp. (2d) 209, aff'd 271 App. Div. 781; *Campbell-Johnston* v. *Liberty Magazine*, 64 N. Y. Supp. (2d) 659, aff'd 270 App. Div. 894; *Age-Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 43; *Julian* v. *Kansas City Star*, 209 Mo. 35, 71, 72; *Forman* v. *Mississippi Publishing Corp.*, 195 Miss. 90; *Winrod* v. *Time, Inc.*, 78 N. E. (2d) 708, 334 Ill. App. 59; *Hartman* v. *Time, Inc.*, 64 F. Supp. 671, 678-80, and see 166 F. (2d) 127, 133, 134; *McGlue* v. *Weekly Publications*, 63 F. Supp. 662; *Means* v. *McFadden*, 25 F. Supp. 993. "Merely showing circulation or distribution of copies of the newspaper

in New Orleans is not sufficient to establish proof of publication." *State* v. *Briwa*, 198 La. 970, 5 So. (2d) 304 (1941). See also *State* v. *Moore*, 140 La. 281, 72 So. 965 (1916); *O'Malley* v. *Statesman*, 60 Idaho 326, 91 P. (2d) 357.

Under the foregoing principles it is immaterial therefore whether the publication in the instant case occurred "but a stone's throw of the jurisdiction" (R. 123) or on the other side of the world. The issue is whether it occurred within or without the jurisdiction. The jury was never permitted to pass on that critical question. The information, the consistent rulings of the trial court and the decision of the Court of Appeals were based upon the identity of "publication" and "circulation". The refusal to instruct the jury to disregard the prosecution's statement that "publication" means the same as "circulation" (R. 131), the refusal to charge the Government's duty to prove a "publication" in the Zone beyond a reasonable doubt (Deft's request No. 1, R. 23-4), the justification of the Government's failure to prove publication within the jurisdiction on the ground that "we would be adopting a mere technical subterfuge if the court should hold that such publication *in Panama* was an insufficient publication to constitute an offense of libel in the Canal Zone" (R. 123) were, therefore, obviously erroneous.

The information fails to contain allegations as to the manner in which publication was made, the person or persons to whom made, or allegations that such persons were unknown to the informant. This disregard of the requirements of the Code that the information set out concisely the acts constituting the offense (Sec. 181(4)) and "the particular circumstances" of the offense charged (Sec. 183), raised by the demurrer, resulted in wide latitude of proof of many "publications" to the Government while, on the other hand, the most stringent limitations of proof and restrictions to the narrow issue of truth and justification were imposed upon the petitioner.

Petitioner was not charged with violation of Section 357 which deals with the liability of the author of a libel published by another. He was charged only under Section 352 dealing with a libel published or procured to be published by himself. The Code clearly distinguishes between the two offenses. Nevertheless the Government was allowed to offer proof of various alleged publications and circulations by petitioner and others inside and outside the Zone, in Spanish and in English on February 4th and February 5th notwithstanding that there was only one count, i.e., one publication charged in the information. Cf. *State* v. *Moore*, 140 La. 281, 72 So. 965 (1916). In its assimilation of "publication" and "circulation" throughout the charge, its failure to instruct the jury that it had to find a "publication" by petitioner, as distinguished from "circulation" by others within the Zone and by its refusal to give defendant's requested charges 1 and 21 dealing with this question (R. 23-4, 25-6), the rights of the petitioner to a trial on issues framed by his plea under the statute were clearly disregarded. See *Cole* v. *Arkansas*, 333 U. S. 196.

Additionally, the trial court, while emphasizing truth and justification as issues, refused to permit petitioner to show the circumstances of provocation by the District Attorney even on the issue of malice, which is an ingredient of the offense (R. 39-41).

Ritchie v. *Stenius*, 73 Mich. 563, the court said:

> "The law makes allowances for the infirmities of human nature, and for what is done in the heat of passion, produced by the improper conduct of the adverse party. * * * The circumstances surrounding the speaking of the words may be given in evidence to rebut the presumption of malice. * * *"

See also: *McKee* v. *Ingalls*, 4 Scam. 30; *Pierson* v. *Stortz*, 1 Morris (Ia.) 136; *Robinson* v. *Keyser*, 22 N. H. 323; 17 R. C. L., Libel and Slander, Sec. 113, p. 364, and cases cited.

Since the statutory presumption of malice contained in the Code is a rebuttal one, how can an accused rebut it except by being permitted to show the surrounding circumstances? *Krasner* v. *State*, 26 So. 526, 248 Ala. 2; 53 C. J. S. Sec. 300, p. 431.

D) The Unfair Conduct of the Prosecutor on the Sentence

In connection with the sentence procedure, the prosecutor subpoenaed and the Court swore several witnesses for testimony in aggravation of the punishment to be imposed. This testimony provided the platform for an inflammatory, vindictive and prejudicial assault against petitioner, his counsel, his associates and co-workers, replete with hysteria, calumny, misstatements, name-calling, and worst of all, ugly anti-semitic, anti-Negro undertones. These proceedings (R. 157-206, 278-99) were grossly improper.

Among those subpoenaed was Max Brodsky, the Regional Director of the union in the Zone. Brodsky concededly had had no connection with the publication, having been in the United States at the time. He had known the petitioner for about 10 or 11 months and only as a result of petitioner's assignment to the Zone as a co-worker. They had had no previous relationship.

The record cannot and does not reflect the anti-semitic innuendoes in the prosecutor's sarcastic, repetitious denunciation of Mr. Brodsky's obviously Jewish name. Mr. Brodsky has as much connection with this case as a man from Mars, yet his name was repeatedly injected with unwarranted prejudicial inflection during the trial, the sentence procedure and the summation on sentence (R. 88, 158-89, 202, 280 et seq.).

On the sentence interrogation he too was examined as to matters which clearly related to the union's liability in the District Attorney's then pending civil case against the unions and which were irrelevant to the then concluded criminal trial of petitioner (R. 160-2, 170, 176 et seq.).

A large part of the prosecutor's speech was devoted to the fact that Mr. Brodsky had been born in Russia, that his name had formerly been Breslow and that he refused to discuss his religious or political views or beliefs (R. 176, 280-1, 288-9, 293-4).

He said: "Dr. Carrington and myself are Episcopalians. Neither one of us is ashamed of it. If I am Jewish, I am not ashamed of it" (R. 281, 291-2). He said it was "scandalous" that Brodsky should refer to the "silver" workers as "brothers" (R. 293). He continued (R. 294):

> "I have no doubt but what Russian born Brodsky is a menace to this community. I have no doubt but what he is subversive. Now if we were in actual conflict, the defendant, the witness Brodsky, and his ilk would constitute dangerous and subversive elements inimical to the best interests of the United States of America and of the Government of the Canal Zone."

Among other references to Brodsky were (R. 288-9):

> "Brodsky does not have any manhood apparently. He does not want the Court to know what his religious or political beliefs are. This little smirking communist on the witness stand seems to think it is funny when the Government of the Canal Zone asked him whether or not he believes in communism and takes refuge in the Constitution of the United States of America. This little cringing communist born in Russia take refuge in the Constitution of the United States, the Constitution which communists at this very moment and Brodsky and his ilk are seeking, sir, to destroy."

There was no evidence whatever that Brodsky is a communist, and such evidence would have been irrelevant. Notwithstanding that the Court had sustained objection to questions relating to religious or political beliefs (165), the prosecutor persisted in asking them (166, 188), and on the second day of his shameful performance, shouted again: "I wish I had asked him yesterday whether he was ashamed of his religion or ashamed of his political beliefs" (R. 292, 281).

His characterizations of petitioner were in the same vein. After impugning his war record (petitioner had been discharged from the Navy for physical disability after eighteen months' service) he went on to declaim about "the communistic tendencies, the communist links of this defendant and his associates with his communist friends and superiors and colleagues, it is a 'red case' so they drag a red herring across the trail" (R. 283) although there is not the slightest proof to support these statements.

He referred to the alleged libel as an "insidious, malicious, criminal, libelous attack on a duly constituted federal authority in this federal judicial district * * * dastardly, criminal, malicious, totally false, false in its entirety" (R. 284). There is not the slightest evidence that the article is false.

In spite of the impropriety of a lawyer's association in argument of his personal belief of the justice of his cause (Canon 15, *Canons of Ethics*), the prosecutor said: "I would not be here, sir, representing the Attorney General of the United States of America before your Honor if that were the situation. I would not be representing the Government, not me personally, sir. I have a discretion as to whether or not I have to or can or should prosecute any particular case. I can get out of it. I can say, 'I do not want to prosecute that type of case.' If this attack which this arrogant itinerant organizer, this communist * * *" (R. 284). Judges are human and the effect of this upon a newly appointed Judge, trying his first jury case in the Court, is not to be underestimated.

The prosecutor said that the petitioner "has the temerity, the arrogance, the facetiousness to think that he could get away with it * * * the boldness, the effrontery, to take it upon himself to comment on the manner in which a case is being handled in the United States District Court" (R. 286-7). Compare, however, *Pennekamp* v. *Florida*, 398 U. S. 331, and *Bridges* v. *California*, 314 U. S. 252, on the right to comment on matters pending in the Courts.

In attacking petitioner because he had a college education he said "he is a skilled, clever, itinerant organizer, college bred, college trained, more liberal arts training than I have, sir. Maybe he shows it. But that is the vice of the situation" (R. 292).

He also repeated the libel originally "substantiated" by the District Attorney that petitioner exists "off of the hard earned dues of the sweating silver workers" (R. 295).

The same treatment was accorded to colored persons called as witnesses. Wholly unnecessarily, he subjected Miss Harewood, a young lady, to disclose the irrelevant fact that she wore false teeth (R. 84). The bombastic and thunderous tenor of his questioning of her seeps through even the record (R. 83, et seq.).

Although refusing leave to appellant to discuss the Nolan case in the opening and during the trial, the Court, during the sentence procedure, allowed the introduction of an interview which the District Attorney had conducted with Nolan in the jail the relevance of which on the sentence is difficult to see except as it reflects the only—and unsuccessful—effort of the Government to show the falsity of the alleged libel. This interview had been conducted without notice or an opportunity to petitioner to be present (R. 258-261).

Also submitted in evidence by way of "aggravation" were releases and protests adopted by many persons and organizations against the prosecution of this case (Govt's K (R. 249), M (R. 252-3), N (R. 253-4), O (R. 255-7), P (R. 257-8), R (R. 261-4)). The case has indeed evoked wide criticism and protest. Why this should be a circumstance in aggravation is difficult to see.

As already indicated not even petitioner's counsel was immune from the prosecutor's tirade. Referring to Dr. Carrington, a member of the bar of the Canal Zone for upwards of thirty-five years and president of the local bar association, the prosecutor said he had made a "stock speech made by criminal lawyers representing communists in the United States District Court" (R. 279); "lawyer Carring-

ton representing the communists claims the privilege that exists between lawyer and client. It is a fine how do you do, when the Government of the United States of America through its Canal Zone in the United States District Court is unable to get before the Court the true facts with reference to the commission of the offense which is under judicial scrutiny" (R. 281); "they drag a red herring across the trial. That is all Dr. Carrington has been doing from the time he started in until he just finished talking and he will try to again if your Honor gives him a chance" (R. 283); and again, "Dr. Carrington will beat around the bush and finagle and talk about everything but the evidence" (R. 285); "all criminal lawyers, most all, would make the same type of an attack upon the United States Department of Justice that Dr. Carrington made when they have no evidence to go on" (R. 286); "in any event, Dr. Carrington's information or statement was way off the beam as many of Dr. Carrington's statements are, way outside the record" (R. 290), and concluded "Well for Dr. Carrington's information, sir, reputable members of the bar of United States District Courts in the United States do not represent communists or Nazis" (R. 293-4).

By these and similar acts, the prosecutor clearly overstepped the bounds of propriety and fairness which should characterize his conduct in the prosecution of a criminal offense. *Berger* v. *United States,* 295 U. S. 78, 79 L. Ed. 1314; *Viereck* v. *United States,* 318 U. S. 236, 87 L. ed. 734; *Glasser* v. *U. S.,* 315 U. S. 60, 86 L. ed. 681.

It is immaterial that most of this occurred before the Court and not the jury, or that it related to the sentence procedure and not the trial. See *Raymond* v. *U. S.,* 25 App. D. C. 555 (1905). The prosecutor's conduct was unfair and disgraceful. It did not belong in the courtroom at any stage of the proceeding. It merited the stern condemnation of the court. On the contrary, unfortunately, it was received by the trial court below without criticism and disregarded by the Court of Appeals. It merits the condemnation of this Court.

CONCLUSION

The methods used by obtain the evidence, the denial of a representative jury, the unprecedented increase in bail at the beginning of the trial, the unfairness of the rulings during the trial, the prejudicial nature of the sentence procedure, the unprecedented penitentiary sentence, the arrest of petitioner before arrival of the mandate of the Court of Appeals, all attest that this proceeding was unfairly conducted in disregard of basic rights and notions of good policy by a bitter and vindictive prosecutor with a personal interest at stake.

The inclusion in the information of charges of circulation, which is not a crime under the Code, the wide and limitless range of proof of publications and circulations by petitioner and others, in English and Spanish, on February 4th and 5th, inside and outside of the Zone, in the face of the narrow charge of a publication by himself in writing in English in the Zone on or about February 4th, and the refusal of the court to allow the jury to pass on the issue framed by the plea, and the emphasis upon an irrelevant issue, resulted in addition, in a denial of minimal standards of due process. *Cole* v. *Arkansas,* supra.

Wherefore, the petitioner prays that his petition for a writ of certiorari be granted.

August 12, 1949.

Respectfully submitted,

NATHAN WITT,
Attorney for Petitioner.

L. S. CARRINGTON,
Ancon, C. Z.,

HAROLD I. CAMMER,
New York City,

of Counsel.

APPENDIX

Provisions of Canal Zone Code

TITLE I—PERSONAL AND CIVIL RIGHTS.—SEC. 1. *Personal and Civil Rights and Guarantees.* There are certain great principles of government which have been made the basis of an existence as a nation which are deemed essential to the rule of law and the maintenance of order, and which shall have force in the Canal Zone. The principles referred to may be generally stated as follows:

a. That no person shall be deprived of life, liberty or property without due process of law;

b. That in all criminal prosecutions the accused shall enjoy the right:

* * * * * * *

2. To be informed of the nature and cause of the accusation;

3. To be confronted with the witnesses against him; * * *

TITLE V—SEC. 351. *Libel defined.* A libel is a malicious defamation, expressed either by writing, printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or to publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.

TITLE V—SEC. 352. *Punishment of libel.* Every person who willfully and with a malicious intent to injure another publishes or procures to be published any libel is punishable by a fine of not more than $5,000, or imprisonment in the penitentiary for not more than one year.

TITLE V—SEC. 354. *Truth and good motives as a defense.* In all criminal prosecutions for libel the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends the defendant shall be acquitted.

TITLE V—SEC. 355. *Publication defined.* To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself.

TITLE V—SEC. 356. *Liability of editors and publishers.* Each author, editor or proprietor of any book, newspaper or serial publication, is chargeable with the publication of any words contained in any part of such book or number of the newspaper or serial.

TITLE V—SEC. 357. *Liability of author of libel.* The author of a libel in all cases is equally guilty and is subject to the same punishment as the publisher, owner or proprietor of the newspaper or other printed publication in which the libelous article appears. The punishment prescribed in Section 352 of this title is applicable to this section.

TITLE V—SEC. 358. *Privilege in publication of true report of public official proceedings.* No reporter, editor or proprietor of any newspaper is liable to any prosecution for any fair and true report of any judicial, legislative or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making the report, which shall not be implied from the mere fact of publication.

TITLE VI—SEC. 181. *Requisites of information in general.* The information must contain:

a. The title of the action;

b. The name of the court to which it is presented;

c. The names of the parties;

d. A statement in ordinary and concise language of the acts constituting the offense, in such manner as to enable a person of common understanding to know what is intended; and

e. A statement that it is based upon due investigation of the facts relating to the crime charged therein, and upon the sworn testimony of one or more witnesses.

TITLE VI—SEC. 183. *Requirement of directness and certainty in certain regards.* The information must be direct and certain as regards:

a. The party charged;

b. The offense charged; and

c. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.